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Supreme Court, U.S.
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No. 03-954

In The
Supreme Court of the United States

THOMAS TIERNEY and DORIS G. MARAH, individually and on behalf of a class of others similarly situated,

Petitioners,

v.

JOHN HANCOCK FINANCIAL SERVICES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Hancock's Brief In Opposition To The Petition avoids the linchpin of the federal constitutional questions presented – that Members' right to enforce their right to compensatory contractual damages in an adjudicatory proceeding was "superceded" by a state "legislative" determination.[1] According to the Massachusetts Appeals Court, Members' right to enforce and establish contractual damages was "superceded" by the legislative determination under the Conversion Law. This "legislative action" gives rise to the Contract Clause and Due Process arguments asserted in the Petition which were presented to, but were rejected by, the Massachusetts courts.

I. The Contracts Clause And Due Process Clause Questions Were Pressed And Passed Upon In The State Courts

No particular form of words or phrases is essential to establish that the federal constitutional claim was pressed or passed upon in the state proceedings. *People v. Zimmerman,* 278 U.S. 63, 67 (1928). What is required is that the claim and ground for federal unconstitutionality be brought to the attention of the state court with fair precision and in due time. *Id.* Members' "Jurisdictional Statement" establishes that the Contracts Clause and Due Process arguments were presented in the Superior Court, the Appeals Court and the Massachusetts Supreme Court. Petition at 1-3. The Appeals Court specifically "passed"

[1] The abbreviations used here are those adopted in the Petition.

upon the Contracts Clause issue, finding that the Conversion Law "superceded" Members' contractual interests. App. 23-24; Petition at 3. This question was specifically presented to the Massachusetts Supreme Court by Petitioners where they stated in their Petition For Further Appellate Review, "An unconstitutional contract impairment involves the elimination of a remedy by the state for the breach." *citing Hays v. Port of Seattle,* 251 U.S. 233, 237 (1920).[2] App. 198, fn. 14.

The Due Process argument addresses whether a State may apply a "law" to deny a litigant the use of an "adjudicatory" procedure for the enforcement of contract rights where the State already has established procedures for the enforcement of contracts. Petition at i. Members persistently asserted that the approval of the Commissioner's Decision, without allowing Members to enforce their right to full contractual damages in an adjudicatory procedure, would be tantamount to an unconstitutional taking. App. 187-191; 198 fn.14; 206-214.

[2] Under Mass.R.App.P. 27.1., the submission of a Petition For Further Appellate Review does not limit the appellant to the issues in the Petition but allows for review of other issues raised in the courts below. See Henn *et al.* "Post Decision Practice" in *Appellate Practice in Massachusetts*, p. 20-11 (MCLE Rev. 2000). Thus, the limited nature of a FAR petition in Massachusetts cannot give rise to a waiver of important constitutional issues raised in the Superior and/or Appeals courts for purposes of jurisdiction in this Court.

II. The Appeals Court Construed State Legislative Action To Have Superceded Members' Right To Enforce Their Contractual Interests And, Therefore, Violated The Contracts Clause

Hancock contends that the Appeals Court properly applied *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 30-31 (1887) to reject Members' Contracts Clause argument. Relying on *New Orleans Waterworks,* the Appeals Court stated that " . . . by enacting the conversion statute, the Legislature effectively superseded the provisions of the charter and individual policies." App. 23-24. 58 Mass.App.Ct. at 588; 791 N.E.2d at 938. The Appeals Court apparently believed that, under *New Orleans Waterworks,* the application of the Conversion Law did not constitute "legislative action" and, therefore, the Contracts Clause did not apply. App. 24.

To the contrary, the application of the Conversion Law to "supercede" Members' right to enforce their contractual interests constitutes "legislative action" under *New Orleans Waterworks.* The Contracts Clause restricts a state court from construing a state legislative enactment to have the effect of "superceding" a pre-existing right to enforce a contract. *Landgraf v. USI Film Products,* 511 U.S. 244, 266-267 (1994). Here, a state administrative officer was delegated the duty to construe and apply the Conversion Law to pre-existing mutual life insurance contracts in the context of "legislative" proceedings and that decision was construed to "supercede" Members' right to enforce their contracts. App. 23-24. This constitutes legislative action under *New Orleans Waterworks Co.*, 125 U.S. at 30-31 ("[I]t is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be [] the form of a statute enacted by the

legislature . . . an exercise of legislative power delegated by the legislature" is also sufficient to fall within the scope of the provision.); *Grand Trunk Western Ry. Co. v. Railroad Comm. of Indiana*, 221 U.S. 400, 403 (1911) ("Observing first, that the order is a legislative act by an instrumentality of the state exercising delegated authority . . . is of the same force as if made by the legislature, and so is a law of the State within the meaning of the contract clause of the Constitution"); *King Manufacturing v. City Council Of Augusta,* 277 U.S. 100, 125-127 (1928) and *E. & E. Hauling, Inc. v. Forest Preserve District of Du Page County, Illinois,* 613 F.2d 675 678 (7th Cir. 1980).

Contrary to Hancock's assertion, the Appeals Court *did* specifically identify the distinct contractual interests of mutual life insurance members. *Cf.* Hancock Brief at 8. The Appeals Court held that the contractual interests of a mutual member include the right to vote, a right to the company's surplus, and a right to a share in the assets upon liquidation of the company. App. 6-8 *citing Keystone Auto. Club Cas. Co. v. Commissioner of Int. Rev.*, 122 F.2d 886, 890 (3d Cir. 1941), *cert. denied*, 315 U.S. 814 (1942); *Mutual Fire Ins. Co. of Germantown v. United States*, 142 F.2d 344, 346, 348 (3d Cir. 1944), *cert. denied*, 323 U.S. 729 (1944); *Mutual Benefit Life Ins. Co. v. Herold*, 198 F. 199, 206-212 (D.N.J. 1912), *aff'd*, 201 F. 918 (3d Cir. 1913), *cert. denied*, 231 U.S. 755 (1913).

These contractual rights were "impaired" because Members were denied the use of an adjudicatory procedure in which the loss of these contractual interests could have been properly valued. In a demutualization, these contractual rights are effectively "redeemed" in order to effectuate the conversion. *See UNUM Corp. v. United States,* 130 F.3d 501, 511 (1st Cir. 1997):

> Here, Union Mutual purchased its policyholders' equity interests and transferred them to UNUM. UNUM in turn exchanged the policyholders' membership interests in Union Mutual for stock in UNUM or cash. UNUM was financially in no worse a position after "paying out" $522 million worth of stock to implement the demutualization than it was before the transaction occurred. What changed was the form of ownership, precisely the topic which capital transactions typically involve.

Despite this "redemption" of their contractual interests, Members' were denied any right to adjudicate the value of these interests to ensure that they received full, compensatory value for them. Petition at 12. The Appeals Court's decision concedes that the non-adjudicative, legislative procedure under the Conversion Law did *not* provide Members their full compensatory damages for the loss of their contractual interests. App. at 11-12.

III. The Denial Of Established State Procedures To Enforce Contractual Interests Violates Due Process Clause

Hancock's argument that no Due Process violation is raised is based upon their misstatement that the proceeding before the Commissioner was "adjudicatory." Hancock Brief at p. 1; 9-10. From this false premise, Respondents contend that Petitioners are merely complaining that the courts agreed with the Commissioner's adjudicative determinations. The Commissioner's decision, however, was not "adjudicatory," it was a "legislative decision." Petition at 10. A "legislative" determination cannot be the basis for replacing well-established procedures for enforcing contract rights or valuing contractual damages.

The Due Process Clause was violated because the Appeals Court construed the Commissioner's "legislative" proceedings to have superceded Members' pre-existing right to enforce their contractual interests in a judicial forum. The Appeals Court found that any pre-existing right to enforce contract damages had been replaced by the administrative procedure under the Conversion Law. App. 23-24. 58 Mass.App.Ct. at 589, 791 N.E.2d at 937. The Members, however, were not permitted to adjudicate or enforce their right to contractual damages in the "legislative" administrative proceedings. App. 26. Nor were Members permitted to adjudicate their contract damage claims in a judicial forum since, the court held that the contract claims had already been determined by the Commissioner, even though she had expressly disclaimed any such adjudication of the contract claims. App. 23-26. In sum, no procedure consistent with due process was provided in which Members could enforce their contractual interests.

CONCLUSION

Wherefore, it is respectfully requested that this Honorable Court grant Certiorari.

Respectfully submitted,

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